92-924

Supreme Court, U.S.
FILED
OCT 14 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES L. GARTHRIGHT, JR.,
Executor,

Petitioner

versus

ESTATE OF MAXWELL GIVENS LOCKE,
Deceased,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

James L. Garthright, Jr.
ATTORNEY FOR PETITIONER
152½ Madison Ave.
Memphis, TN 38103
(901) 525-2783

QUESTIONS FOR REVIEW

1. Did Probate Court violate rights of petitioner under due process provisions of Amendments 5 and 14 of the Constitution of the United States in not following Tennessee Rules of Civil Procedure and Rules of Probate Court adopting those rules involving issuance and service of process or notice.

2. Was trial court bifurcation of administrative and adversary issues in Complaint so inextricably entertwined as to not admit of that procedure violate his rights.

3. Did failure to hear and rule on all motions of petitioner filed prior to responsive pleading until day of his removal as executor trial without time to file answer or take proof violate his rights.

4. Did failure to hear defenses of

petitioner of waiver, laches, estoppel, and permit attack, without proof, of prior judge's order, violate his rights.

5. Did adoption of trial court opinion by Court of Appeals and refusal of Tennessee Supreme Court to permit discretionary appeal violate his rights.

STATEMENT OF RELATED CASES

There are no other appeals or related cases to be affected by this Writ to my knowledge.

STATEMENT OF JURISDICTION

The Jurisdiction of this Court for this Writ is 1991 Rules of this Court as amended in 1992.

STATEMENT OF GROUNDS

Judgement of Tennessee Court of Appeals, December 31, 1991, and Order of Tennessee Supreme Court refusing discretionary appeal, July 16, 1992 (in appendix).

STATEMENT OF CASE

The trial court failed to follow applicable State rules of procedure and the rules of his court adopting them creating the due process violations involved and created a procedural problem by bifurcation of inextricably inseparable issues preventing a fair hearing in all proceedings and hearings; permitting orders to be entered nunc pro tunc over five months later over protest of petitioner without hearing motion of petitioner; characterizing documents executed by income beneficiary with representation of her home state counsel as improper and ineffective without proof and a hearing; being critical of petitioner of being antagonistic to income beneficiary when petitioner was trying to protect the estate and his being unmindful that petitioner had increased the estate by another one-half million

dollars; and denying two motions for new trial without a hearing.

The Court of Appeals simply adopted the erroneus opinion of trial court and the Tennessee Supreme Court refused discretionary appeal.

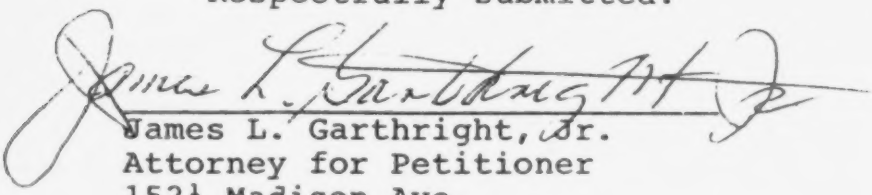
ARGUMENT

For sake of brevity, petitioner simply states that the action set out herein has violated practice, procedure, his constitutional rights, irreparably harmed him as a licensed professional attorney with superior rating, cast improper inferences as to his character and honor, and this Court is his last resort for justice.

PRAYER

That this Honorable Court grant this petition and any other relief he may be entitled to.

Respectfully submitted:



James L. Garthright, Jr.
Attorney for Petitioner
152½ Madison Ave.
Memphis, TN 38103
(901) 525-2783
Sup. Ct. TN. Disc. #7786

APPENDIX

James L. Garthright, Jr., Attorney for Petitioner herein, was duly admitted and qualified as an attorney and counselor of the Supreme Court of the United States on November 10, 1965.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

IN RE: ESTATE OF MAXWELL GIVENS LOCKE,
Appellees,

vs.

SHELBY PROBATE
NO. 10618-2 R.C.

JAMES L. GARTHRIGHT, JR.,
Apellant.

FILED: 8/21/1992

ORDER

The appellant has filed a motion in this Court pursuant to Rule 42(c)(d), Tennessee Rules of Appellant Procedure, seeking a stay of mandate. Appellant's Rule 11 application was denied on April 27,.1992. His first petition to rehear was denied on June 22, 1992, and his second petition to rehear was denied on July 16, 1992. Upon consideration of Appellant's motion to stay the mandate in this cause, we are of the opinion that the motion is not well taken and should be denied. This 21st day of August 1992.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

IN RE: ESTATE OF MAXWELL GIVENS LOCKE, Deceased,

Plaintiff/Appellee,

vs.

SHELBY PROBATE #1
(B-10618)

JAMES L. GARTHRIGHT, JR., Executor,

Defendant/Appellant. FILED: 12/31/91

ORDER

This cause came on to be duly heard and considered and for the reasons stated in the opinion of this Court of even date, it is ordered:

1. The judgment of the trial court is affirmed and the cause is remanded to the Probate Court of Shelby County for further proceedings not inconsistent with this opinion.

2. Plaintiff's motion to have defendant's appeal declared frivolous is denied.

3. Costs of this cause are taxed against Garthright, individually, and not against the estate, for which execution

may issue if necessary.

ENTER: Dec 31, 1991.

TOMLIN, P.J., W.S.

CRAWFORD, J. (Concurs)

HIGHERS, J. (Concurs)

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

IN RE: ESTATE OF MAXWELL GIVENS LOCKE, Deceased,

Plaintiff/Appellee,

vs.

SHELBY PROBATE #1
(B-10618)

JAMES L. GARTHRIGHT, JR., Executor,

Defendant/Appellant. FILED: 1/21/92

ORDER SUBSTITUTING PAGE

On December 31, 1991, the opinion and order in this matter was filed with the Clerk of this Court. It was subsequently brought to the attention of the Court that page 1 of the opinion contained a typographical error and should be replaced.

IT, THEREFORE, ORDERED, that page 1 of the opinion in this matter filed on December 31, 1991, be replaced with the attached revised page.

ENTER: Jan 21, 1992

PER CURIAM

This is an appeal by James L. Garthright, Jr. (hereinafter "Garthright") from an order of the Shelby County Probate Court removing his as Executor of the Estate of Maxwell Givens Locke ("Decedent"). Garthright also served as attorney for decedent's estate. The appeal was granted following an application for extraordinary appeal by Garthright pursuant to Rule 10 T.R.A.P. We limited the appeal to the single issue of Garthright's removal as executor. The action was brought by the beneficiaries of the dec-dent. The sole lifetime beneficiary, Virginia Rapp, will be referred to as "Virginia." The other beneficiaries, where needed to be referred to shall be designated as "Children."

We have noted the singular issue presented to us on appeal. After reviewing this record, this Court is of the opinion that the judgment of the lower court should be affirmed in all respects. In

addition, for the reasons herein stated, we find the appeal not to be frivolous.

Decedent, the widow of Lewis Leroy Locke, died in October, 1987, at age 80. She left a will, dated August 11, 1986, prepared by Garthright, naming Garthright as executor of her estate. The record also reflects that Garthright also prepared her late husband's will and was named executor of his estate as well.

Certain provisions of decedent's will are relevant to the issue in this case. First and foremost, of course, is the fact that Garthright was named executor of decedent's estate to serve without bond. The will directed Garthright as executor to sell decedent's home, located in a very desirable section of Memphis. He was authorized to sell it under such terms and conditions as he deemed proper and after paying any

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

IN RE: ESTATE OF MAXWELL GIVENS LOCKE, Deceased,

Plaintiff/Appellee,

vs. SHELBY PROBATE #1
(B-10618)

JAMES L. GARTHRIGHT, JR., Executor,

Defendant/Appellant. FILED: 12/31/91

From the Probate Court of Shelby County
at Memphis
Honorable Donn Southern

Susan Callison, Memphis
For the Plaintiff/Appellee

James L. Garthright, Jr., Memphis
For the Defendant/Appellant

OPINION FILED: DEC 31, 1991

AFFIRMED AND REMANDED

TOMLIN, P.J., W.S.

CRAWFORD, J: (Concurs)

HIGHERS, J.: (Concurs)

This is an appeal by James L. Garthright, Jr. (hereafter "Garthright") from an order of the Shelby County Probate Court removing him as Executor of the Estate of Maxwell Givens Locke ("Decedent"). Garthright also served as attorney for decedent's estate. The appeal was granted following an application for extraordinary appeal by Garthright pursuant to Rule 10 T.R.A.P. We limited the appeal to the single issue of Garthright's removal as executor. The action was brought by the beneficiaries of the decedent. The sole lifetime beneficiary, Virginia Rapp, will be referred to as "Virginia." The other beneficiaries, where needed to be referred to shall be designated as "Children."

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Certain provisions of decedent's will are relevant to the issues in this case. First and foremost, of course, is the fact that Garthright was named executor of decedent's estate to serve without bond. The will directed Garthright as executor to sell decedent's home, located in a very desirable section of Memphis. He was authorized to sell it under such terms and conditions as he deemed proper and after paying any expenses of sale the net proceeds were to become a part of her estate.

In section IV of the will decedent bequeathed to Virginia the following items of personal property:

> ...my wedding and engagement rings and my mother's diamond ring; mink stole and mink jacket; antique plates and picture of her grandmother; furniture, household appliances and draperies; silver plate flatware; sterling silver cream and sugar set and any automobile owned by me at my death;

Section V of decedent's will provided that by her will she was exercising the power of appointment in connection with the residue of a marital trust given her in the will of her late husband. In so exercising this power of appointment the residue of said marital trust was to be disposed of under the terms and conditions of decedent's will. With the exception of specific bequests of certain personal property, decedent's entire estate, in-

cluding the residue of the marital trust created for her under the will of her late husband, was left in trust to the National Bank of Commerce as Trustee for the use and benefit of her niece, Virginia with all the income to be paid to Virginia during her lifetime, and with an additional provision that the trustee could make such principal payments as it deemed "necessary or desirable" to provide Virginia with "proper maintenance, support and comfort." The remaindermen of the trust were the children, per stirpes.

Article VI of the will also contained the following paragraph, highly pertinent to the issue here under consideration:

> My niece, Virginia Marie Rapp, shall be entitled to all of the income of this trust, from and after the date of my death, and my executor or trustee, notwithstanding any other provisions of this will, shall approximate the

amount of income from this trust and pay same to my niece during the administration of my estate, applying any such payments against the income to which she will be entitled, or making such other adjustment as may be necessary when the exact amount of the corpus of the trust is determined;

The record clearly reflects that Virginia was the favorite relative of decedent. Decedent and her husband had no children. Virginia was decedent's niece. Virginia and her family had had financial difficulties for some years, and for some period of time decedent and her late husband had been sending sums of money regularly to assist Virginia and her family in meeting their financial obligations. At the time of decedent's death it appears that she was sending Virginia $500 per month. The record does not reflect specifically what Garthright knew about this

relationship, but decedent's love for Virginia is apparent from the fact that decedent named her the sole income beneficiary of the vast majority of her estate, and made a specific bequest to her of many valuable items of personal property.

Immediately following decedent's funeral, the basis for extended disagreements between Virginia and Garthright began to develope. Virginia's request of Garthright that he advance her some funds from the estate, to be later charged back against her, was met with a requirement by Garthright that she execute a waiver of final accounting and an agreement to his closing the estate on petition and order in lieu of making a final accounting.

Some two months later, when Virginia and her husband came to Memphis to pick up the automobile and other personal property, Garthright refused to give her pos-

session of certain items, contending that they did not qualify as "furnishings" under the will. Again, Garthright required the same type of waiver of Virginia before turning over to her assets specifically bequeathed to her. Of a more disturbing nature was Garthright's refusal to provide Virginia with any information or data about the nature or size of the estate. These disagreements and others subsequently resulted in Virginia employing Memphis counsel in June, 1988. For some several months thereafter Virginia's counsel was also unsuccessful in persuading Garthright to furnish her with copies of documents describing the estate's assets and income. At this time Virginia as a sole income beneficiary was being paid $1000 a month from the estate that was shortly thereafter revealed to be in excess of $1 million, virtually all of which was in liquid assets.

The matters of irritation between Garthright and Virginia attained what might be called its climax when in late 1988 or early 1989 Virginia learned of the filing of Garthright on December 15, 1988, of a ten page "Petition for Allowance of Fees" for himself and his accountant. No prior notice was given to either Virginia or her counsel as required by the Rules of the Probate Court of Shelby County. A six page order was entered on the same day following an ex parte hearing before retiring Probate Judge Joseph Evans allowing the accountant a $5,000 fee and allowing Garthright a $75,000 executor/attorney fee, based on a gross estate of $1,124,550.00. At this time Virginia was being paid as income beneficiary $1,800.00

On February 22, 1989, shortly after learning of the fee order, Virginia through her counsel filed a verified petition to set aside the fee award and for

additional relief. This petition also raised the propriety of a fee based on an estate created by the draftsmanship of *Garthright and the handling* of the power of appointment from decedent's late husband's will. It also raised other breaches of fiduciary duty on Garthright such as his failure to put decedent's house on the market in a timely fashion, the failure to convert non-income producing assets to income producing, the failure to make an accounting, the waste of estate assets and generally bad faith.

Legal proceedings from and after that time generated reems of documents rarely found in an estate with no contested claims. Approximately a month after filing the above mentioned petition Virginia filed a request for production of documents concerning various aspects of the estate. Following Garthright's failure to comply, in June 1989, Virginia sought

a court order compelling discovery. Garthright responded with motions to strike, at the same time challenging her capacity to sue.

Virginia filed responses and counter motions, one seeking an injunction against Garthright, requiring him to abide by the will provisions. Following a discussion of that motion in chambers Garthright distributed over $16,000 in "back income" to Virginia, thereafter increasing her monthly "allowance" to $8,000. In August, 1989 Garthright filed an interim accounting that showed that four months following decedent's death he had written himself a check for $30,000 as a partial payment of fees. This payment was "credited" against the $75,000 allowed him by Judge Evans in December 1989, when he paid himself the additional $45,000. Virginia through counsel filed exceptions to this interim accounting.

In October, 1989, following a non-evidentiary hearing the court determined that Garthright was properly before the court in his capacity as executor but was not before the court in his individual capacity. At that time the court orally ordered Garthright to supply counsel with specifically enumerated items set forth in the earlier discovery requests. The following month all of the beneficiaries, including children, filed what was designated as a second petition against Garthright both as executor and individually. This petition sought new relief: that he be removed as executor.

In March, 1990, due to the fact that Garthright had not complied with the court's earlier oral order pertaining to discovery, an order on the motion to compel discovery was entered. Garthright's application for extraordinary appeal to this court was denied.

Following that Garthright filed alternative motions to dismiss and to strike the second petition. The court set the trial on the prayer for removal for June 19, 1990. Prior to the trial the court denied all of Garthright's motions to dismiss and held that the beneficiaries had standing to sue. After a three day trial the court ordered Garthright removed as executor and his letters testamentary cancelled, due to a totality of circumstances. In so doing the court made extensive findings.

Following the entry of the order of removal Garthright filed four extraordinary appeal applications with this court, the first three of which were denied. The fourth was granted on October 23, 1990.

On November 7, 1990, Garthright filed a second accounting, wherein he disclosed among other things that not until that day had he turned over the estate's assets to

NBC. It also reflected that he had purchased for $191 certain coins (188 silver dollars and 6 one-half dollars) from decedent's estate that did not appear as assets on the death tax return nor as an item in any inventory, inasmuch as Garthright never filed an inventory. The second accounting also reflected the charges for the court reporter's who transcribed the removal trial in June and July 1990. Both the beneficiaries and NBC as trustee have filed exceptions to this second accounting. These matters are currently pending in the probate court.

The court granted Garthright's application for extraordinary appeal. However we note that he would have had the right of direct appeal pursuant to Rule 3, TRAP See In Re: Wooten's Estate, 114 Tenn. 289, 85 S.W. 1105 (1904); Rodes v. Boyers, 106 Tenn. 434, 61 S.W.2d 76 (1901); and Crozier v. Goodwin, 69 Tenn. 125, aff'd., 69

Tenn. 368 (1878).

In the case of McFarlin v. McFarlin, 785 S.W.2d 367 (Tenn.App. 1989), in an opinion by Judge Koch, the Middle Section of this court dealt with a removal question very similar to the case here under consideration. Judge Koch laid down the standards to be applied in a case such as this:

> The legal standards against which Mr. McFarlin's performance as executor should be measured are well understood. He occupies a fiduciary position, Mason v. Pearson, 668 S.W.2d 656, 663 (Tenn.Ct.App. 1984), and must deal with the estate and each of its beneficiaries in the utmost good faith. Baker v. Baker, 24 Tenn.App. 220, 240, 142 S.W.2d 737 750 (1940). Like any other fiduciary, he is required to exercise the same degree of diligence and caution that reason-

ably prudent business persons would employ in the management of their own affairs. In re Estate of Inman, 588 S.W.2d 763, 767 (Tenn.Ct.App. 1979); In re Estate of Cuneo, 73 Tenn.App. 507, 515, 475 S.W.2d 672, 676 (1971); 2 H. Phillips & J. Robinson, Pritchard on Wills and Administration of Estates §715 (4th ed. 1984) (hereinafter "Pritchard").

[1] The law favors the prompt administration of estates. Burris v. McConnel, 187 Tenn. 489, 496, 216 S. W.2d 10, 12 (1949). Accordingly an executor has a duty to marshal and collect the estate's assets within a reasonable time. Campbell v. Miller, 562 S.W.2d 827, 832 (Tenn.Ct.App. 1977); Price v. Price, 37 Tenn.App. 690, 694-95, 269 S.W.2d 920, 922 (1954); Pritchard §716. An executor must also discharge its statutory ob-

ligations in a timely manner. See Williams v. Thornton, 160 Tenn. 229, 234, 22 S.W.2d 1041, 1042 (1930); Love v. First Nat'l Bank, 646 S.W.2d 163, 166 (Tenn.Ct. App. 1982); State ex rel. Burrow v. Cothron, 21 Tenn. App. 519, 529-30, 113 S.W.2d 81, 87 (1937). Finally, an executor must distribute the estate in a timely manner and close its administration as quickly as possible. Pritchard §718.

Prior to ordering the removal of Garthright as executor, the trial court thoroughly reviewed the circumstances presented by the proof at trial that led to his decision. The probate judge first and foremost noted whether or not there was sufficient justification or basis for hostility or animosity between the ultimate beneficiaries of the estate and the executor. The court also expressed concern about the delay of Garthright in disposing

of decedent's home, noting that the residence was vacant for some 21 months after death prior to it being sold. The court noted that the house was not put on the market for several months after the death of decedent. This resulted in approximately $4000 in vacant property insurance expense being incurred by the estate. The court also noted that while the executor stated he conducted the sale in the manner he did so as to prevent the property being sold to "undesirable persons" the court stated, "as a fiduciary, the sole concern should be the prompt and expeditious sale for the best price available of an asset without increasing expenses," noting that the goal of Garthright was not the type of goal that the law placed upon a fiduciary.

The court expressed grave concern that the record reflected that over an extended period of time Garthright refused to dis-

close information about the estate to the beneficiaries that they were entitled to, and that he even refused to do so after an oral ruling by the court some months previous. The court also noted that not until the eleventh hour and under the pressure of litigation did Garthright provide this information.

The court also raised questions about the payment of attorney fees by Garthright to himself. The court found that a substantial amount of the fee was paid early on without court permission, and that the balance of the fee was paid pursuant to petition and order without any notice whatsoever to the primary beneficiary or her attorney. In connection with this proceeding the court found that while three affidavits of attorneys were obtained in support of Garthright's fee, they were not presented to the court at the time the fee was awarded and, as a

matter of fact, were not filed until many months after the order was entered.

In addition, the court noted that on several occasions in dealing with the primary beneficiary Garthright obtained a waiver of final accounting and an agreement from her to permit him to close the estate on petition and order. The court found that they were obtained under pressure and that they were unenforceable and should not be relied upon in these proceedings.

Lastly, the court found that the continuation of Garthright in the position of executor could possibly place him or the estate in a position of conflict of interest, involving disputes with the Department of Revenue and Mr. Lewis Leroy Locke's estate.

Our scope of review on appeal is de novo upon the record. Absent and error of law, unless we find that the evidence

preponderates against the findings of the trial court, we must affirm. Rule 13(d) TRAP. After reviewing this record, this court is of the opinion that the overwhelming evidence supports the action of the trial court in every respect. In looking at the record with a broad overview in the first instance, down to the post trial legal manuevering, this record reflects the presence of an unjustified antagonistic attitude of the executor toward Virginia, the primary beneficiary. At every turn Garthright seemed to resist Virginia's every request. Repeatedly when she asked for a reasonable financial assis- after decedent's death, when she returned two months later to pick up some of the personal property and when she asked for another advancement following the tragic death of her son-in-law, leaving her daughter and a small child without financial support, Garthright insisted as a condi-

tion precedent to satisfying some of the special bequests or paying over some of the estate income to her that she sign a document agreeing to waive a final accounting and any necessity of a final accounting, and that she further agree to the estate being closed on petition and order rather than by a final accounting. Virginia testified that she at no time was given any explanation as to the significance of what she was signing.

Upon her return to Memphis following the funeral, he advised her that she could not have the T.V., VCR, the pictures or the mirrors in decedent's home, notwithstanding the fact that she was left the "furnishings" in the home as "they were not furnishings". On this same visit Garthright advised Virginia that notwithstanding who she was he could not permit her and her husband to spend the night in decedent's home without him and his wife

staying there with her.

The record reflects that after Virginia telephoned NBC, the designated trustee under the will, almost a year following decedent's death, to inquire about the nature of the assets in the estate, the bank advised her they could not tell her anything. Subsequently, Garthright called Virginia and instructed her not to call the bank again seeking information about the estate. Lastly, as already pointed out, Garthright repeated refused to send or allow the bank to send any data concerning contents of the estate to Virginia or later to her attorney.

The technical record consists of almost 300 pages covering a span of slightly more than two years. This record is replete with with motion after motion filed by Garthright seeking to counter the action of Virginia to bring about an expeditious conclusion of this estate or to gain

information that would be of help to her as primary beneficiary. The litigious attitude alone of Garthright is enough to create disharmony, resentment and unpleasantness.

When testifying as a witness in the hearing below, Garthright was indefinite and evasive on several occasions. Following the ruling of the Probate Court removing him as executor, within a span of a few months Garthright filed four applications for extraordinary appeal to this court.

The trial court was greatly concerned with the persistent refusal to furnish Virginia information concerning the estate. We share that concern. This court is even more concerned about the cavalier manner in which Garthright treated the assets of the estate insofar as compensating himself is concerned. Without seeking court approval or notifying the beneficiaries,

approximately four months after decedent's death Garthright wrote himself a check for $30,000. Later on December 15, 1988, as the record reflects, the very day Judge Evans retired from the Probate bench, Garthright filed a petition allong with a six page order for fees, granting himself a fee in the amount of $75,000 for his services as executor and attorney for the estate. While his petition listed enough activities that he had carried out to be justified such a fee to consume ten pages, omitted from this rescitation of activities was the fact that some ten months previous he had already paid himself $30,000 toward this fee, without court approval. Nowhere does the petition for fees reflect that notice of the filing of same was given to Virginia or her counsel.

While the last paragraph of the petition states that:

> He conferred with three disinterested members of this bar who are in good standing, had practiced before this court for more than five years; that he has made available to them the U.S. Estate Tax Return, the accreted value of the estate, the income derived, his file concerning matters, work and time involved and other related information; and that those attorneys have made affidavits stating the reasonable fee each considers proper for petitioner both as executor and attorney, which affidavits are furnished in support of this petition...

the record reflects that these affidavits, although dated December 14, 1988, were not filed in the Probate Court Clerk's office until April, 1990.

On the matter of filing, the record reflects that Garthright failed to file an inventory in this estate, as required

by TCA §30-2-301. He also failed to file an accounting with 15 months of qualification as required by TCA §30-2-601. After receiving a citation on July 11, 1989, he did file the accounting, but he failed to account for tangible personal property. In addition, he failed to file the death tax returns within 9 months of the date of death. Extensions were obtained by his accountant for the reason that the accountant had not received the necessary data from Garthright in time to timely file. The resulting delay brought about interest expense in the amount of $2,000 for late filing.

These actions or failure to to act, as the case may be, are brought into sharper focus by the fact that Garthright has been a practicing attorney for some 43 years. He is charged with knowledge of the law in this area. He is charged with knowing that an executor's primary responsibility is to

carry out the desires and intentions of the testatrix. There is nothing ambiguous or unclear about what that intention was, as set forth in decedent's will. This type of conduct, particularly by an attorney, should not and will not treated lightly.

It is apparent that there is, or at least was, pending at the time this case was appealed to this court the petition of Virginia to set aside the payment of fees to himself by Garthright. There also appears to be pending a petition to have the estate reimbursed for unnecessary expenses incurred as a result of Garthright's mismanagement. While we perceive that under the authority of McFarlin, supra, this court might proceed to pass judgment upon the disallowance of the executor's fee for failure to administer the estate in a competent manner and for the repayment to the estate of any penal-

ties or interest the estate has been required to pay because of his failure to timely file State and Federal tax returns, this court does not wish to take any action that would complicate or endanger its ruling on the principal issue before it. We have the utmost confidence in the court in which these other matters are pending. We believe he will administer justice in a fair and even handed way.

All things considered, the judgment of the Probate Court removing Garthright as executor is affirmed. Costs of this cause on appeal are taxed against Garthright, individually, and not against the estate.

Beneficiaries have moved to declare Garthright's appeal frivolous pursuant to the provisions of TCA §27-1-122. It appears that an action for sanctions to recover expenses and costs is pending in the court below. We again express our confidence in the trial court. Buttressed

by this opinion we are convinced that justice and equity will prevail. Therefore this motion is denied. This cause is remanded to the Probate Court of Shelby County for further proceedings not inconsistent with this opinion.

TOMLIN, P.J., W.S.

CRAWFORD, J.

HIGHERS, J.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

IN RE: ESTATE OF MAXWELL GIVENS LOCKE, DECEASED,

Appellees,

v. Shelby County

JAMES L. GARTHRIGHT, JR.,

Appellant.

ORDER

The petition to rehear filed by Mr. Garthright on July 16, 1992, is hereby DENIED, this 16th day of July, 1992.

PER CURIAM